

## **DRAFT MODEL PREEMPTIVE RIGHTS AGREEMENT FOR NEBRASKA**

### **(Right of First Offer with Right of First refusal)**

This Right of First Offer Agreement ("Agreement") is made as of *[date of agreement]*, between *[name of grantor]* *[OPTIONAL: capacity of grantor]* ("Grantor") and *[name of grantee]* *[OPTIONAL: capacity of grantee]* ("Grantee").

#### Recitals

**A.** Grantor is the owner of certain real property described in attached Exhibit A, incorporated in this Agreement ("Real Property") *[OPTIONAL: and the improvements constructed on the Real Property ("Improvements")]*, more commonly known as *[street address of property]*, *[name of city]*, *[name of county]*, *[name of state]*, *[description of property]*.

**B.** Grantor desires to grant to Grantee and Grantee desires to obtain from Grantor a right of first offer to purchase the Real Property *[OPTIONAL: and the Improvements]* together with all rights of Grantor in adjoining streets, rights of way, and easements, and all other appurtenant rights, and all personal property belonging to Grantor on the Real Property (collectively, the "Property") on the terms and conditions in this Agreement.

For good and valuable consideration, the receipt and adequacy of which are acknowledged, the parties agree as follows:

#### **Section 1: Right of First Offer**

**(a)** Grantor shall not sell or agree to sell the Property without first offering to sell it to Grantee. The word "sell" shall include any transfer, conveyance, assignment, lease, hypothecation, or pledge of all or any portion of the Property or Grantor's interest in the Property, except for:

- (i)** a conveyance or transfer by gift, bequest, or inheritance; or
- (ii)** a lease for a term, including extension options, not exceeding *[number of years]* years.

After a conveyance or transfer by gift, bequest, or inheritance, the right of first offer granted in this Agreement shall remain in effect against the person holding fee title to the Property or any other interest in the Property.

**(b)** Prior to Grantor entering into an agreement for the marketing of the property or otherwise selling or agreeing to sell the Property, Grantor shall offer in writing ("First Offer") to sell the Property to Grantee on the same terms and conditions that Grantor would then be willing to offer to a third party. The First Offer shall, at a minimum, include the following information:

- (i)** the purchase price;
- (ii)** the method of payment of the purchase price;

(iii) the amount and terms of any Grantor financing;

(iv) the amount of the required earnest money deposit; and

(v) the time and location for the close of escrow.

(c) Grantee shall have *[number of days]* days from the date of the First Offer to accept the First Offer ("Acceptance Period") by delivering to Grantor acceptance on or before *[time of delivery]* *[A.M./P.M.]* on the last day of the Acceptance Period. If Grantee fails to accept the First Offer before the Acceptance Period ends, the First Offer shall be deemed rejected.

(d) If Grantee responds to the First Offer with anything other than an unequivocal, unconditional acceptance or rejection, the right of first offer shall terminate and the response shall be deemed an offer to purchase the Property on the terms and conditions in the response ("Counter Offer"). Grantor shall be entitled to accept or reject the Counter Offer at Grantor's sole discretion, and if Grantor rejects the Counter Offer, Grantor shall have no further obligations under this Agreement.

(e) If Grantee accepts the First Offer, Grantee shall have *[number of days]* days following acceptance of the First Offer ("Closing Period") to consummate the purchase of the Property pursuant to the terms and conditions of the First Offer. If Grantee fails to consummate the purchase of the Property within the Closing Period, any earnest money paid by Grantee pursuant to the acceptance shall be paid to Grantor as Grantor's liquidated damages, and the agreement to purchase the Property together with this Agreement shall be terminated. After the termination, Grantor shall be free to enter into an agreement for the sale of the Property with a third party on whatever terms Grantor may choose to offer without further obligation under this Agreement.

(f) If after Grantee rejects the First Offer, Grantor negotiates with a third party and is otherwise willing to enter into an agreement with that party on terms substantially less favorable to Grantor than those contained in the First Offer, Grantor shall offer to sell the Property to Grantee on those new terms by giving Grantee written notice ("Second Offer"). Grantee shall have *[number of business days]* business days from receipt of the Second Offer to accept the new terms. If Grantee fails to accept the new terms or rejects the new terms in writing, Grantor shall be free to consummate the transaction with the third party without any liability to Grantee. If Grantee accepts the new terms, Grantee shall then immediately consummate the transaction with Grantor on the terms and conditions in the Second Offer on the later of:

(i) the time for consummation in the Second Offer, or

(ii) *[Number of days]* days following the date of the Second Offer.

### **Section 2: Consideration**

The consideration for this Agreement is *[description of consideration for entering into agreement]*.

### **Section 3: Term**

(a) Grantee's right of first offer shall begin with the date of this Agreement and continue until *[time of termination of offer]* *[A.M./P.M.]* on *[date of termination of offer]* ("Term"), unless terminated sooner in accordance with the terms of this Agreement.

(b) A total of *[number of extensions]* extensions of *[number of months]* months each may be purchased by Grantee. Each

extension is available only if the prior extension was purchased in a timely manner. Grantee may purchase an extension by paying to Grantor \$ [dollar amount of extension price] dollars on or before [time of termination of offer] [A.M./P.M.] [number of days] days before the last day of the Term or any subsequent extension.

#### **Section 4: Termination**

This Agreement shall automatically terminate and have no further effect upon the first of the following events to occur:

- (a) The expiration of the Term, as it may be extended;
- (b) Grantee, in contravention of this Agreement, assigns or attempts to assign Grantee's rights under this Agreement;
- (c) Grantee rejects a First Offer or a Second Offer and Grantor subsequently consummates a sale of the Property to a third party pursuant to the terms of this Agreement; or
- (d) The purchase of the Property by Grantee.

#### **Section 5: Litigation Costs**

If any legal action or any other proceeding, including arbitration or action for declaratory relief, is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default, or misrepresentation in connection with this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees and other costs, in addition to any other relief to which the prevailing party may be entitled. "Prevailing party" shall include, without limitation:

- (i) a party who dismisses an action in exchange for sums allegedly due;
- (ii) the party that receives performance from the other party of an alleged breach of covenant or a desired remedy where the performance is substantially equal to the relief sought in an action; or
- (iii) the party determined to be the prevailing party by a court of law.

#### **Section 6: Assignment; Successors**

Grantee's rights and obligations under this Agreement shall not be assigned without Grantor's prior written consent, and any assignment without that consent shall be void. Subject to this restriction, this Agreement shall inure to the benefit of and be binding on the parties and their respective successors, heirs, personal representatives, and assigns.

#### **Section 7: Notices**

All notices, demands, requests, and exercises under this Agreement by either party shall be delivered by hand, sent by United States Mail, Registered or Certified, postage prepaid, addressed to the other party, or sent by telecopy or similar means, if a copy of the notice is also sent by U.S. Certified Mail as follows:

*[list of names, addresses, and tax numbers of parties on whom notice is to be served, both grantor and grantee, including names and addresses of counsel for both grantor and grantee.]*

Notices, demands, requests, and exercises served in this manner shall be considered sufficiently given or served for all purposes under this Agreement at the time the notice, demand, request, or exercise is delivered by hand, when postmarked to the addresses shown above, or on transmittal by telecopier or other similar means, provided that a transmission report is generated that reflects the accurate transmission of the notices.

The addresses above may be changed by written notice to the other party; provided, however, that no notice of a change of address shall be effective until actual receipt of the notice. Copies of notices are for informational purposes only, and a failure to give or receive copies of any notice shall not be deemed a failure to give notice.

#### **Section 8: Time of Essence**

Time is of the essence in this Agreement.

#### **Section 9: Memorandum for Recordation**

Immediately following the execution of this Agreement, the Memorandum of Right of First Offer Agreement attached as Exhibit *[designation of exhibit 1]* shall be recorded by Grantor in the official records of *[name of county]*, Nebraska.

#### **Section 10: Quitclaim Deed**

Concurrent with the execution of this Agreement, Grantee has delivered to Grantor a signed and acknowledged quitclaim deed in the form of attached Exhibit *[designation of exhibit 2]*. Grantor may record the quitclaim deed following the termination of this Agreement. If Grantee purchases the Property, Grantor shall return to Grantee the quitclaim deed at the consummation of the purchase.

#### **Section 11: Captions**

Captions and headings in this Agreement are for convenience only and should not be considered in construing this Agreement.

#### **Section 12: Entire Agreement**

This Agreement and the Exhibits contain the entire agreement of the parties and supersede all prior agreements or understandings of the parties, whether written or oral, regarding the subject matter of this Agreement.

#### **Section 13: Modification**

This Agreement may not be modified or amended except in writing signed by Grantor and Grantee.

#### **Section 14: Waivers**

No waiver or breach of a covenant or provision in this Agreement shall be deemed a waiver of any other covenant or provision in this Agreement, and no waiver shall be valid unless in writing and executed by the waiving party.

#### **Section 15: Construction**

In construing this Agreement, the singular form shall include plural and vice versa. This Agreement shall not be construed as if it had been prepared by one of the parties, but rather as if both parties have prepared it. Unless otherwise indicated, all references to sections are to this Agreement.

#### **Section 16: Further Assurances**

Whenever requested by the other party, each party shall execute, acknowledge, and deliver any further conveyances, agreements, confirmations, satisfactions, releases, powers of attorney, instruments of further assurance, approvals, consents, and any further instruments and documents that are necessary, expedient, or proper, in order to complete any conveyances, transfers, sales, and agreements covered by this Agreement, and to do all other acts and to execute, acknowledge, and deliver any requested documents in order to carry out the intent and purpose of this Agreement.

#### **Section 17: Third-Party Rights**

Nothing in this Agreement, express or implied, is intended to confer on any person, other than the parties and their respective successors and assigns, any rights or remedies under this Agreement.

#### **Section 18: Counterparts**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute the same instrument.

#### **Section 19: Partial Invalidity**

Any provision of this Agreement that is unenforceable or invalid or the inclusion of which would adversely affect the validity, legality, or enforcement of this Agreement shall have no effect, but all the remaining provisions of this Agreement shall remain in full force.

#### **Section 20: Exhibits**

All attached exhibits are incorporated in this Agreement by this reference.

#### **Section 21: Authority of Parties**

All persons executing this Agreement on behalf of a party represent and warrant that they have the authority to execute this Agreement on behalf of that party.

#### **Section 22: Governing Law**

This Agreement shall be interpreted and construed in accordance with Nebraska State law.

The parties have executed this Agreement as of the date first written above.

##### **GRANTOR:**

*[Name of GRANTOR, including capacity if appropriate]*

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

##### **GRANTEE:**

*[Name of GRANTEE, including capacity if appropriate]*

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

#### SPOUSAL ACKNOWLEDGMENT

The undersigned acknowledges that the undersigned has no right, title, or interest, whether present or future, in Property. The undersigned further acknowledges and agrees that the undersigned has read this Agreement and had its effect explained satisfactorily by counsel chosen by the undersigned, and consents to this execution and performance of this Agreement by Optionor.

\_\_\_\_\_ *[Name of spouse]*

*[Attach exhibits and schedules]*

## ***ADDENDUM***

### **B. ADDITIONAL PROVISIONS**

Typically, RFOR grantees are in possession of the Property. If the Grantee is not in possession, then it may want access.

***Right of Entry.*** During the term of this Agreement, the Grantee, the Grantee's agents, employees, independent contractors and engineers will have the right from time to time to enter on the Property at the Grantee's sole risk for the purpose of inspecting the same and conducting surveys, engineering studies, borings, soils tests, environmental studies, investigations, feasibility studies and such other studies, tests and inspections as the Grantee deems appropriate. All such entries will be made in such a manner as to minimize any material interference with the Grantor's use of the Property. The Grantee, to the Grantor's reasonable satisfaction, will restore the Property as nearly as possible to the condition immediately preceding any exercise by the Grantee of the right of entry and inspection granted to Grantee pursuant to this Agreement. The Grantee agrees to indemnify, defend and hold the Grantor harmless from all liability or claims of liability directly or indirectly arising out of any such entry; which indemnification obligation will survive the termination of this Agreement

On occasion disputes arise whether a certain transfer triggers and ROFR. Set out below is provision designed to prevent intra-family transfers from triggering an ROFR. Similar provisions can be drafted for transfers among entities controlled by the same person(s).

***Excluded Conveyances.*** The provisions hereof do not apply to the following transactions:

- (a)** A gift of the Property, or a part thereof, to a relative by blood or marriage, in which case this Agreement and its covenants are binding upon the donee and upon the donee's heirs and assigns.
- (b)** Descent or devise of the Property, or a part thereof, on death, in which case said provisions are binding upon the heirs or devisees and their heirs and assigns.

### **C. RFOR (ALTERNATE 1):**

This is a traditional RFOR entitling the grantee to match a pending offer:

**1.** Right of First Refusal. If at any time the Grantor shall receive a bona fide offer from any person, persons, organization, or organizations to purchase in whole or in part, the property in the County of *[name of county]*, State of Nebraska, more particularly described in Exhibit    and made a part hereof, the Grantor shall send Grantee a copy of the proposed Contract and notify Grantee of its intention to accept the same. The Grantee shall have the right within *[number of days]* days to accept the terms of said Contract in writing and within *[number of days]* days thereafter to purchase the above-described property in its own name or in the name of a nominee, for the gross purchase price and on the terms specified in said Contract. If the Grantee shall not so elect within the said period of *[number of days]* days, the Grantor may then sell the above-described property to said offeror provided the said sale is on the said terms and conditions and for the price set forth in the said Contract sent to Grantee.

**2.** Warranty. Grantor herein hereby warrants and covenants good and marketable title to the premises described in Exhibit *[designation of exhibit 3]* attached *[omitted]* and good right, full power, and lawful authority to grant, bargain, sell, and convey this Right of First Refusal.

**3.** Default. Should the Grantor herein enter into an assignment, sale, transfer, conveyance, lease with a term (including both primary and option periods) in excess of *[number of years]* years or lease with option to purchase in

conflict with this Right of First Refusal, the Grantees may, at their option, in legal proceedings seek to have a court of competent jurisdiction declare this Agreement breached and decree and order that said assignment, sale transfer, conveyance, lease with a term in excess of number of years years or lease with option to purchase is null, void, and of no effect. Nothing contained herein shall be construed to prevent specific performance of this Right of First Refusal or any term herein by either party.

Notwithstanding anything to the contrary contained herein, this Right of First Refusal shall in no way restrict Grantor's right, power, or authority to mortgage or encumber, grant easements, or grant a lease or leases, without option to purchase and for a term (including both primary and option periods) not in excess of number of years years. Nor shall this Right of First Refusal in any way restrict or prohibit transfers by operation of law, transfers between Grantor and Grantee herein, or any transfer from list of names of grantors as Grantors to name of grantee as Grantee.

**4. Termination.** This Right of First Refusal shall extinguish, terminate, and be null and void upon the consummation of assignment, sale, transfer, or conveyance in fee simple to a third party of the above-described premises after full compliance with the terms of this Right of First Refusal, provided the sale is on the said terms and conditions and for the price set forth in the said contract sent to Grantee; however, if such sale is not consummated, this Right of First Refusal shall remain in effect, provided, however, to the fullest extent permitted by and under Nebraska law.

**Note:** This provision was originally drafted to insulate the RFPR from a challenge under the Rule Against Perpetuities. I have modified it to permit the RFOR to survive as long as legally permissible. This clause may generate a court test.

Subsequent to termination as above provided, Grantee shall upon Grantor's request execute and acknowledge a document stating such facts as are pertinent and fully relinquishing, waiving, and releasing all rights and obligations hereunder.

*Prepared for Legal Aid of Nebraska Farm Project  
With funding from North Central Risk Management Education Center*